

STATE OF MICHIGAN
COURT OF APPEALS

COVERED BRIDGE FARMS ASSOCIATION,

Plaintiff/Counter-Defendant-
Appellant/Cross-Appellee,

v

GREGORY SMITH and TRESE SMITH,

Defendants/Counter-Plaintiffs-
Appellees/Cross-Appellants.

UNPUBLISHED

March 31, 2009

No. 282009

Macomb Circuit Court

LC No. 2004-004830-CH

Before: Saad, C.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Plaintiff/counter-defendant Covered Bridge Farms Association (plaintiff) appeals as of right the trial court's judgment nunc pro tunc denying its request for attorney fees. On cross-appeal, defendants/counter-plaintiffs Gregory and Trese Smith (defendants) appeal as of right the same judgment. We affirm.

Plaintiff is a residential site condominium project in Macomb County. Defendants are the owners of a condominium unit in the association. Plaintiff's bylaws require the developer's/plaintiff's written approval for the construction of any building, structure, or other improvement on the property. In early 1999, defendants submitted an application for approval of an in ground swimming pool. Plaintiff approved installation of the pool in January 1999. However, due to financial constraints, defendants did not proceed with installation of the pool at that time. In April 2003, defendant Trese Smith, who was a member of plaintiff's board, testified that she showed the board a revised pool plan, which included a pool house, that she received oral approval from the board at that time, and that she was advised to submit the revised plans "later" for the board's file. Believing that they were authorized to proceed with construction, in July 2003, defendants installed the pool and pool house. Thereafter, defendants were notified that a board meeting was to be held to address the construction of their pool house. At that meeting, in September 2003, plaintiff informed defendants that the bylaws did not allow for ancillary structures and it rejected a variance for defendants' pool house; defendants were directed to remove the pool house. Defendants did not comply with this request.

In November 2004, plaintiff filed a complaint for injunctive relief seeking to compel defendants to remove the pool house. A bench trial was held before Judge John Foster. Two members of plaintiff's board, including the board's president, testified that they believed that the

bylaws provided that no ancillary structure could be approved under any circumstances, and consequently, they did not have the authority to approve an ancillary structure like defendants' pool house. A third board member did not testify regarding this issue, while the fourth member testified that the board did have the authority to approve ancillary structures.¹ On October 26, 2006, the trial court rendered its opinion from the bench. It found that defendants' pool house violated plaintiff's bylaws because it was an ancillary structure for which defendants did not get written approval prior to construction. It also found that plaintiff did not waive the requirement regarding prior written approval because any alleged waiver was not in writing, in violation of the bylaws. However, the court concluded that the board failed to exercise its discretionary authority in deciding the pool house matter because the board was under the mistaken impression that it could not approve ancillary structures, despite the fact that the bylaws provided that they were permissible. The court thus concluded that defendants were deprived of their due process rights under the bylaws to have plaintiff decide their application using the full exercise of its discretionary authority. The court stated that defendants were permitted to resubmit their pool house application to plaintiff, and plaintiff was required to review it in light of the understanding that board members have the authority under the bylaws to approve ancillary structures. Finally, the court denied plaintiff's request for attorney fees, finding that plaintiff "failed to comply with the bylaws or prevail completely." The court's ruling was not reduced to a written order, apparently due to an oversight. Thereafter, defendants resubmitted their application for approval of the pool house, which plaintiff once again denied.

The case was transferred to Judge David Viviano for posttrial proceedings to determine whether plaintiff's decision denying defendants' resubmitted pool house application was reached in accordance with the bylaws, in which case plaintiff would be entitled to a permanent injunction. After holding an evidentiary hearing, Judge Viviano determined that plaintiff acted in accordance with the bylaws and therefore, was entitled to an injunction. Judge Viviano issued an August 3, 2007, opinion and order to that effect, which also noted that the last pending claim was resolved and the case was closed. The opinion and order made no mention of attorney fees.

On August 22, 2007, plaintiff filed a claim of appeal in this Court, seeking review of Judge Foster's decision denying plaintiff attorney fees. This Court dismissed plaintiff's claim of appeal for lack of jurisdiction, because plaintiff was not aggrieved by the trial court's August 3, 2007 order from which plaintiff sought to appeal, as that order was silent on the issue of attorney fees. *Covered Bridge Farms Assoc v Smith*, unpublished order of the Court of Appeals, entered September 13, 2007 (Docket no. 280210). Plaintiff sought reconsideration, requesting that this Court enter a nunc pro tunc order amending the trial court's August 3, 2007 order to include Judge Foster's October 26, 2006 decision denying plaintiff attorney fees, or alternatively, for an order permitting the trial court to enter such an order. This Court denied plaintiff's motion for reconsideration without explanation. *Covered Bridge Farms Assoc v Smith*, unpublished order of the Court of Appeals, entered October 18, 2007 (Docket no. 280210). Thereafter, plaintiff filed a motion in the trial court seeking entry of a written order denying its request for attorney fees.

¹ Trese Smith was the fifth member of plaintiff's board at the relevant time; she abstained from voting on defendants' pool house because of her obvious personal interest in the matter.

After a hearing, at which it determined that plaintiff was entitled to entry of a written order effectuating Judge Foster's prior denial of attorney fees, the trial court entered its "Judgment Nunc Pro Tunc Denying Plaintiff's Request for Attorney Fees and Costs through October 26, 2006." It is from this judgment that the parties now appeal.

Defendants' cross-appeal will be discussed first, as it addresses a preliminary matter. On cross-appeal, defendants argue that the issue of whether the trial court improperly denied plaintiff's request for attorney fees is not properly before this Court because the law of the case doctrine barred the trial court from entering the judgment nunc pro tunc. We disagree. Whether the law of the case doctrine applies is a question of law subject to de novo review. *Ashker v Ford Motor Co (On Remand)*, 245 Mich App 9, 13; 627 NW2d 1 (2001).

Plaintiff's motion for reconsideration in this Court asked this Court to enter a nunc pro tunc judgment effectuating Judge Foster's October 26, 2006 oral opinion denying plaintiff attorney fees. This Court denied plaintiff's motion without explanation. Defendants claim that, pursuant to the law of the case doctrine, the trial court was barred from reconsidering plaintiff's request for a nunc pro tunc judgment. As this Court explained in *International Union v State*, 211 Mich App 20, 24; 535 NW2d 210 (1995),

The law of the case doctrine states that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals as to that issue. The doctrine seeks to promote finality with regard to litigated issues and to prevent forum shopping. . . . The law of the case doctrine is a discretionary rule of practice.

The doctrine applies to questions specifically determined in a prior decision and to questions necessarily determined to arrive at the decision.
[Citations omitted.]

This Court's denial of plaintiff's motion for reconsideration did not necessarily resolve the issue of whether the law permits entry of a nunc pro tunc order correcting a clerical oversight. This Court's order denying reconsideration does not mention a nunc pro tunc order, let alone analyze the issue of whether such an order would be appropriate. This Court's ruling need not be taken as anything more than an expression that it was standing by its earlier decision to dismiss plaintiff's first appeal because plaintiff was not aggrieved by the August 3, 2007 order from which it appealed. Because of the defect in plaintiff's first appeal, this Court was not obligated to grant plaintiff's motion for reconsideration, even if it believed that entering a nunc pro tunc order would have been a permissible remedy under the law. That is to say, this Court's denial of the motion for reconsideration does not mean that it implicitly ruled that a nunc pro tunc order would have been impermissible or improper under the law. Consequently, the law of the case doctrine does not apply and defendants show no error with respect to the trial court's decision to enter a judgment nunc pro tunc to correct the clerical oversight. Such a conclusion comports with fairness in that, without a written order embodying Judge Foster's denial of attorney fees, plaintiff is precluded from exercising its right to appeal the attorney fee issue.

On direct appeal, plaintiff argues that the trial court erred by denying it attorney fees. We disagree. This Court reviews a trial court's decision to award attorney fees for an abuse of

discretion. *Windemere Commons I Ass'n v O'Brien*, 269 Mich App 681, 682; 713 NW2d 814 (2006); *Reed v Reed*, 265 Mich App 131, 163; 693 N.W.2d 825 (2005).

Plaintiff claims that it is entitled to attorney fees based on its bylaws. The bylaws state that, “[i]n any proceeding arising because of an alleged default by any Co-owner, the Association, *if successful*, shall be entitled to recover the costs of the proceeding and such reasonable attorney’s fees (not limited to statutory fees) as may be determined by the court.” (Emphasis added). Plaintiff argues that it complied with the bylaws in reviewing and denying defendants’ pool house application, and therefore, that it should have been granted the injunction at trial, rendering it the successful party. Plaintiff does not argue that it would still be entitled to attorney fees in the face of a finding that it violated the bylaws. Therefore, the issue at hand is whether plaintiff did indeed violate the bylaws in deciding defendants’ application. If it did, the trial court’s determination that it was not the successful party, and thus not entitled to attorney fees, is correct.²

First, the bylaws do allow for ancillary structures. They state, in pertinent part, that “[n]o building of any kind shall be erected except private residences and structures ancillary thereto.” The bylaws require the developer’s or plaintiff’s written approval for the construction of any building, structure, or other improvement on the property. The bylaws provide that the developer/association “shall have the right to base its approval or disapproval of any plans, designs, specifications, submissions or other matters on such other factors, including completely aesthetic considerations, as the Developer (or the Association) in its sole discretion may determine appropriate or pertinent.” Similarly, no variance will issue without the developer’s written approval, which the developer may withhold in accordance with his discretion.

The parties are in agreement that the board’s decision on defendants’ pool house application should be evaluated by the standard set forth in the cases of *Ardmore Ass’n v Bankle*, 329 Mich 573, 578; 46 NW2d 378 (1951), and *West Bloomfield Co v Haddock*, 326 Mich 601, 613; 40 NW2d 738 (1950). Those cases provide that, where a developer has retained the right of approval with regard to a unit owner’s proposed structure, “[h]e is required to consider the facts and must be fair and reasonable in approving or rejecting the plans submitted.” *West Bloomfield*, *supra* at 613; see also *Ardmore*, *supra* at 578 (stating that “[t]he power to approve must be exercised in a fair and reasonable manner”). The inquiry then is whether the board properly applied the “rule of reason” in denying a unit owner’s plans. *Cohan v Riverside Park Place Condominium Ass’n*, 123 Mich App 743, 746; 333 NW2d 574 (1983). “Under the ‘rule of

² Defendants argue that this Court does not have jurisdiction over the due process issue because the November 5, 2007 order from which plaintiff appeals does not address this issue. This argument is unpersuasive. The order appealed from addresses the issues of attorney fees and both sides’ noncompliance with the bylaws. The noncompliance issue goes hand in hand with the due process issue, both of which are encompassed by the attorney fee issue. In other words, plaintiff expressly bases its attorney fee argument on the premise that plaintiff was the prevailing party because its decisionmaking process did not violate the bylaws and did not deprive defendants of their due process rights.

reason,' a condominium association's board must demonstrate that it acted reasonably in denying a unit owner's special request." *Id.*

Here, at least two of the board members, one of which was the association president, believed that the bylaws prohibited any and all ancillary structures and further believed that they had no authority to approve ancillary structures under any circumstance. While recognizing that the board has great discretion in approving or denying an ancillary structure, we are inclined to believe that the board does not act fairly or reasonably when it acts pursuant to the mistaken belief that ancillary structures are prohibited and therefore, that it lacks the authority to approve any ancillary structure. As the trial court observed, the board's material mistake of fact rendered it altogether incapable of exercising the discretion bestowed upon it by the bylaws, and thus, plaintiff acted in contravention of the bylaws. Regardless whether this violation amounted to a denial of defendants' due process rights, there was no error in the trial court's finding that plaintiff's violation justified denial of an injunction. Accordingly, the trial court did not err in denying plaintiff attorney fees through the trial phase of the lower court proceedings on the basis that it was not the successful party at trial.

We note that plaintiff could be considered the successful party with respect to the posttrial proceedings where plaintiff was granted an injunction. However, plaintiff never requested, nor was there ever any ruling regarding, posttrial attorney fees. In fact, when the trial court asked plaintiff at the November 5, 2007, hearing whether it was seeking posttrial attorney fees in light of the posttrial proceedings, plaintiff expressly stated that it was not. Therefore, we need not address whether plaintiff is entitled to posttrial attorney fees.

We affirm. Defendants, having prevailed, may tax costs pursuant to MCR 7.219.

/s/ Henry William Saad

/s/ Richard A. Bandstra

/s/ Joel P. Hoekstra